No. 87-271

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

HARBISON-WALKER REFRACTORIES,
A DIVISION OF DRESSER INDUSTRIES, INC.,

Petitioner,

v.

EUGENE F. BRIECK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether a plaintiff in an action brought pursuant to the Age Discrimination in Employment Act of 1967, 29 U.S.C. Sections 621 *et seq.*, must present direct evidence of discrimination or indirect evidence of discrimination in the form of statistical evidence, in order to survive an employer's motion for summary judgment, or may such a plaintiff produce only indirect evidence that the employer's proffered reasons are a pretext for discrimination?

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STATEMENT OF THE CASE

Petitioner's Statement of the Case is defective because of the inaccuracies included in such Statement and because of the omission of important facts from such Statement.

With regard to the inaccuracies, Petitioner states as true, matters which are in dispute. For example, Petitioner alleges that its decision to retain Faust was in part because he had broader experience than Respondent, and such allegation has been disputed by Respondent. Respondent has alleged specific facts showing that he had greater experience than Faust, including Respondent's being the only one of the four installation specialists to have been sent out on international assignments, the most recent such assignment having been to Turkey shortly before his permanent layoff (Record on Appeal at 106a-107a, 165a, 359a), and his having worked for Petitioner for nearly 17 years as an installation specialist (Record on Appeal at 7a-8a, 295a), whereas Faust had worked as an installation specialist at most for only three to four years as of July, 1982 (Record on Appeal at 304a-310a); none of these matters have been rebutted in any way by Petitioner.

Petitioner alleges that the decision to retain Faust was based also on his having "slightly higher performance ratings than Respondent." Petition at 3. However, an internal memorandum from F.P. Shonkwiler to Petitioner's Manager of Employee Relations, John M. Nicolella, stated that Faust and Respondent had identical ratings for the years 1981 and 1982. (Record on Appeal at 277a-278a, 294a-295a). Equally important was the admission by Donald Jamison, Respondent's immediate supervisor for the period from 1975-76 until Respondent was laid off in July, 1982, that he

had "always" rated Respondent a "3", which was "fully satisfactory" in Petitioner's rating system. (Record on Appeal at 235a, 331a-332a). Such information directly contradicts sworn statements of several of Petitioner's managers that Respondent had received a "2", or fair, rating in 1979 and 1980 (Record on Appeal at 31a, 332a). Also, in March, 1982, Respondent received a laudatory note from his supervisor, along with a merit raise, and was about to be sent to Turkey on an international refractory installation (Record on Appeal at 9a, 359a), whereas there is no evidence that Faust had received a merit raise or any laudatory memoranda.

Petitioner alleges that part of its decision to retain Faust was that Faust, "unlike Respondent," had "experience in installation work in blast furnace casthouses". Petition at 3. However, Respondent has challenged such allegation in the various materials submitted to the district court in opposition to Petitioner's motion for summary judgment. For example, Respondent indicated that he had "hit them all", referring to all types of refractory installations, and specifying the types of installations where he had experience, which included blast furnace casthouses. (Record on Appeal at 94a, 118a-119a)

With regard to the omissions from Petitioner's Statement of the Case, Petitioner conveniently failed to indicate that of the four installation specialists employed in Petitioner's Iron and Steel Marketing Support Group immediately before the layoff of installation specialists which began in July, 1982, only Hugh Faust was less than forty years old; all of the other three installation specialists were over forty years old, and in the protected age group. Faust was the last of these four installation specialists to

be laid off, his temporary layoff not beginning until mid-November, 1982. (Record on Appeal at 105a, 299a). Faust was the only one of the four installation specialists to be permanently recalled (Record on Appeal at 299a-300a), and is the only one who remains as an employee of Petitioner.

Petitioner also omitted mention of its own written policy, disseminated to its employees in its employee newsletter, regarding the considerations to be used by Petitioner in determining which employees to lay off; in the words of Petitioner's Senior Vice-President Ralph Ytterberg, Petitioner would lay off based on two factors: the ability to do the remaining job skills, and length of company service. (Record on Appeal at 9a-10a, 103a-104a). Although Faust had less seniority than Respondent, and although he lacked experience in certain types of installations such as degassers and open hearths (Record on Appeal at 105a, 323a), Faust was retained, and Respondent received a permanent layoff, despite his having the greatest seniority of any of the four installation specialists (Record on Appeal at 105a). With regard to the relative ability to perform the job skills remaining, there is a dispute between the parties as to whether Faust had greater skills, or whether Respondent had more skills. (Record on Appeal at 106a-108a, 118a-119a, 122a-123a, 128a-129a, 139a-141a).

The Proceedings Below

Petitioner conveniently fails to mention important materials submitted by Respondent in opposing Petitioner's motion for summary judgment, and misstates the proceedings below. Contrary to Petitioner's suggestion that Respondent "did not dispute that Faust had more diverse experience, and that, from time to time, Harbison-Walker

utilized 'hat experience'', Petition at 4, Respondent presented idence indicating that following the layoff of the three installation specialists over age 40, any utilization by Petitioner of that part of Faust's skills related to margins, was for an extremely small portion of Faust's time. Faust himself indicated that of the 25 per cent of his time spent in the office, as opposed to the 75 per cent of his time spent on the road supervising refractory installations, such 25 per cent of his time was spent in preparing reports such as all the installation specialists, including Faust and Respondent, had always prepared, in doing margins, in filing, and in doing "gofer" work. (Record on Appeal at 299a-302a, 316a-317a, 324a-326a). Respondent indicated that he could easily have done any of such tasks as Faust performed while in the office. (Record on Appeal at 106a-108a).

Petitioner also misstates Respondent's position, when it states that Petitioner in opposing the motion for summary judgment, "questioned only the Company's business judgment that such diverse experience was utilized enough to justify Faust's, and not Respondent's, recall". Petition at 4.

Petitioner indicates that the United States Court of Appeals for the Third Circuit in reversing the district court, relied "solely on its recent decision in *Chipollini v. Spencer Gifts*, 814 F.2d 893 (3d Cir. 1987) (*en banc*), *petition for cert. filed*, 55 U.S.L.W. 3872 (U.S. June 17, 1987) (No. 86-2007. . . ." Petition at 5. Although it is true that the only case cited by the Third Circuit in the decision below was *Chipollini*, the Third Circuit in its opinion in *Chipolini*, issued a scant three months before it issued its opinion in the instant case, relied heavily on the decisions of the United States Supreme Court in *Trans World Airlines v.*

Thurston, 469 U.S. 111 (1985), *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983), *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

SUMMARY OF ARGUMENT

I. The decision below does not conflict with principles established by the United States Supreme Court.

A. The decision below was in keeping with well-established principles of the United States Supreme Court, as enunciated in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983), *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *Furnco Construction Corporation v. Waters*, 438 U.S. 567 (1978).

B. Petitioner has distorted the record evidence and the decision below, and has ignored the main thrust of the recent decision of the United States Court of Appeals for the Third Circuit in *Chipollini v. Spencer Gifts*, 814 F.2d 893 (3d Cir. 1987) (*en banc*), *petition for cert. filed*, 55 U.S.L.W. 3872 (June 17, 1987) (No. 86-2007).

C. Respondent has presented the sufficient quality and quantum of indirect evidence necessary to rebut the reasons proffered by Petitioner in justification of its failure to retain Respondent, and the sufficient quality and quantum of indirect evidence necessary to survive Petitioner's motion for summary judgment.

II. Summary judgment is still available for dismissal of frivolous or inconsequential claims; however, the instant case is not such a case.

III. The decision below does not conflict with decisions of other courts of appeals.

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REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT CONFLICT WITH PRINCIPLES ESTABLISHED BY THIS COURT.

The decision below of the Court of Appeals for the Third Circuit was merely an application of existing and well-established principles as set forth in *Trans World Airlines v. Thurston, United States Postal Service Board of Governors v. Aikens, Texas Department of Community Affairs v. Burdine, Furnco Construction Corp. v. Waters,* and *McDonnell Douglas Corp. v. Green.* Petitioner is most inaccurate in stating that Respondent is "merely . . . questioning his employer's business judgment, without presenting any evidence, direct or indirect, that his employer's judgment was in fact motivated by an intent to discriminate." Petition at 7. Such argument depends on a distortion of the record, and Petitioner has indeed distorted the record, as indicated above in Respondent's Statement of the Case.

Petitioner argues essentially that the method set forth in *Aikens, Burdine* and *Furnco* for an employment discrimination plaintiff to establish that the employer acted with an intent to discriminate, should be changed. The import of Petitioner's argument is that the only method that should be afforded an employee to rebut an employer's articulated legitimate non-discriminatory business reason, is direct evidence, by way of presentation of "smoking gun" evidence,

or indirect evidence, apparently meaning statistical evidence, such as that which would be used in a disproportionate impact employment discrimination case as opposed to a disparate treatment case, such as the instant case. That is not the method set forth in the above-mentioned decisions of the United States Supreme Court.

A. The Decision Below Does Not Contravene This Court's Allocation of Evidentiary Burdens in Employment Discrimination Cases and Standards for Summary Judgment.

Petitioner relies on language in *Celotex Corp. v. Catrett,* — U.S. —, 106 S. Ct. 2548 (1986), which indicated in part that the non-moving party's "complete failure of proof concerning an essential element of the non-moving party's case renders all other facts immaterial." *Id.,* at 2552-53. Petitioner then concludes that this language, when read in conjunction with other Supreme Court decisions concerning the standards governing the summary judgment procedure and in conjunction with the shifting burden of production cases, requires Respondent "to adduce—as he would have to at trial—sufficient evidence to support the essential element of his case: that he was the victim of discrimination 'because of his age' ". Petition at 10. It becomes clear from the rest of its argument that the only method acceptable to Petitioner is "smoking gun" evidence or statistical evidence of the type to be used in a disproportionate impact case, as opposed to a disparate treatment case such as the instant case.

Petitioner grossly distors the record when it claims that the Third Circuit decision in the instant case permits an employment discrimination plaintiff such as Respondent to survive a motion for summary judgment "simply by

second-guessing his employer's business judgment, even though he admits all of the facts underlying that judgment, even though the legally mandatory inference of unlawful discrimination has 'dropped from the case' . . ., and even though he has produced no specific evidence, direct or indirect, that the employer's judgment was really motivated by intentional discrimination." Petition at 10-11. This is an unprincipled reading of the Third Circuit decision below, especially when read in conjunction with the Third Circuit's recently-decided 9-1 *en banc* decision in *Chipollini v. Spencer Gifts,* which decision was referred to in the decision below. The Third Circuit in the decision below and in *Chipollini v. Spencer Gifts* was merely applying well-established principles enunciated by the Supreme Court.

Respondent did more than merely question his employer's business judgment. As indicated in Respondent's Statement of the Case, Respondent produced evidence to establish that Faust, the only one of the four installation specialists under age 40, was the last of the four installation specialists to be laid off, and the only one following the layoffs to be permanently recalled.

As set forth in Respondent's Statement of the Case, Respondent also presented evidence showing inconsistencies and implausibilities in the two basic proffered reasons for the favorable treatment of Faust, i.e., Faust's allegedly broader experience and more versatile skills, and his allegedly having higher performance ratings than Respondent. In addition, Respondent produced evidence to show that Petitioner by selecting Respondent for permanent layoff and by retaining Faust, violated its own stated policy favoring the employee with greater company seniority.

Petitioner further raises the spurious argument that the decision below imposes upon an employer "a virtually unattainable [burden]: to show that the plaintiff will be 'unable' to create some factual dispute concerning the employer's proffered reasons." Petition at 11. Petitioner embellishes such spurious argument by stating,

> . . . [A]n employer in the Third Circuit can prevail on summary judgment in an employment discrimination case only if it convinces the court that its business judgment is unimpeachable. Further . . . the decision below relieves the ADEA plaintiff of his obligation to produce specific facts concerning an essential element of his case—intentional discrimination on the basis of age—in order to defeat summary judgment. Petition at 11.

Among other consequences, Petitioner's argument would deprive Respondent of any opportunity to test before a jury the credibility of Respondent's witnesses. Petitioner's argument would result in a standard whereby merely by mouthing the alleged reasons, an employer would not have its articulated reason challenged before a jury, in the absence of direct evidence or statistical evidence such as would be used in a disproportionate impact case.

B. The Decision Below Does Not Contravene This Court's Recognition That the ADEA Should Not Interfere With Traditional Business Judgments.

Although Petitioner cites numerous cases for the proposition that a court must be careful not to intervene in business judgments, its argument regarding the instant case is based upon a continued distortion of the record evidence and of the decision below, and upon ignoring the Third Circuit's en banc decision in *Chipollini v. Spencer Gifts.*

Petitioner intimates that Respondent has not come forth with any evidence, and has merely raised a "subjective disagreement" with his employer's business judgment. Petition at 11. Those may be the facts in some other case, but they are not the facts in the instant case. Moreover, although Petitioner may want the ultimate fact-finder to make such a conclusion at trial, it is highly inappropriate for a court to make such a conclusion at the summary judgment stage under the facts of the instant case. The recent Supreme Court cases regarding standards to govern motions for summary judgment do not change the overriding principle that summary judgment should not be used as a vehicle for substitution of the opinion of the district judge of the evidence presented, for the opinion of a jury. As stated by the Third Circuit in *Chipollini v. Spencer Gifts,*

> In the context of the summary judgment motion, . . . the court should have considered whether evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge reasonably *could* support an inference that the employer did not act for non-discriminatory reasons, not whether the evidence *necessarily* leads to that conclusion that the employer did act for discriminatory reasons . . . The district court erred in weighing competing inferences and in resolving disputed facts. *Id.*, at 900. (Emphasis in original.) (Citation omitted.)

The standard desired by Petitioner would make it impossible for most victims of discrimination to prevail in the absence of direct evidence of discrimination. Such a standard is not in keeping with established law. The correct standard was stated by the Third Circuit in *Chipollini v. Spencer Gifts,* as follows:

> A defendant which is less than honest in proffering its reason to discharge risks an unnecessary age discrimination verdict. . . . [T]he McDonnell Douglas test is based on the Supreme Court's assumption that "when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer based his decision on an impermissible consideration such as [age]." Furnco [Construction Corp. v. Waters], 438 U.S. [567] at 577. . . . If the plaintiff convinces the trier of fact that it is more likely than not that the employer did not act for its proffered reason, then the employer's decision remains unexplained and the inferences from the evidence produced by the plaintiff may be sufficient to prove the ultimate fact of discriminatory intent in accordance with the [United States Postal Service Board of Governors v.] Aikens standard. *Id.*, at 899.

The actions of the district court which were criticized in *Chipollini* were very similar to the actions of the district court in the instant case. The Third Circuit's reversal of the district court in the instant case was proper, and was merely an application of existing principles and standards enunciated by the Supreme Court.

II. THE DECISION BELOW DOES NOT VIRTUALLY ELIMINATE SUMMARY JUDGMENT IN EMPLOYMENT DISCRIMINATION CASES.

Once again, Petitioner distorts the record evidence as well as the Third Circuit decision below, and ignores the Third Circuit decision in *Chipollini v. Spencer Gifts,* when it argues that the decision below means that "an employee can defeat summary judgment merely by questioning the 'credence' of his employer's articulated nondiscriminatory reasons", Petition at 13. Respondent did not "merely question" his employer's stated reasons, i.e., he did not

merely say, "That isn't true." He produced evidence directly contesting such stated reasons, such as the evidence summarized in Respondent's Statement of the Case, and he also called into substantial doubt whether the stated reasons were the real reasons, by quoting statements from Petitioner's employees, including Faust, Respondent's immediate supervisor Donald Jamison, F.P. Shonkwiler, Manager of Employee Relations Nicolella, and Senior Vice-President Ytterberg; such statements conflict with the stated reasons or serve to render the stated reasons implausible, and thereby substantial doubt is cast on the credibility of the stated reasons.

Employers still may use the summary judgment procedure to obtain dismissal of frivolous or inconsequential claims of age discrimination. However, summary judgment should not be used in a substantial case such as the instant case.

III. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS CONCERNING SUMMARY JUDGMENT IN DISCRIMINATION CASES.

In arguing that there is a conflict in the decisions of the courts of appeals, Petitioner once again distorts the record evidence and the Third Circuit decision below, and ignores the recent *en banc* decision of the Third Circuit in *Chipollini v. Spencer Gifts*. Petitioner distorts the meaning of the decision below in alleging that it stands for the proposition "that an ADEA plaintiff can defeat summary judgment, without presenting any evidence, direct or indirect, that his employer's business judgment was tainted by an intent to discriminate". Petition at 15. This clearly is not

what the decision below stands for, nor does the *Chipollini* decision cited by the Third Circuit in the decision below indicate anything of the sort.

Such a ridiculous distortion of the decision below is compounded by Petitioner's spurious allegation that Respondent failed to introduce any indirect evidence. As pointed out above in Respondent's Statement of the Case and in Arguments I and II, Respondent presented evidence directly challenging the reasons proffered by Petitioner in justification of the preferential treatment of Faust. As stated above, Respondent produced statements from Petitioner's own managers, including F.P. Shonkwiler and Respondent's immediate supervisor Donald Jamison, which were inconsistent with the proffered reason that Faust had higher performance ratings than Respondent. Moreover, as set forth above, Respondent in his deposition testimony and in his affidavit in opposition to the employer's motion for summary judgment, directly challenged the assertion that Faust had greater job-related experience than Respondent.

With regard to the alleged conflict in the decisions of the courts of appeals, the decisions of the First, Sixth and Seventh Circuit Courts of Appeals cited by Petitioner either failed to follow the clearly-established principles set forth in the Supreme Court decisions of *Aikens, Burdine* and *Furnco*, or are factually distinguishable from the decision below and from *Chipollini v. Spencer Gifts*. For example, *White v. Vathally*, 732 F.2d 1037 (1st Cir.), *cert. denied*, 469 U.S. 933 (1984), was a case cited by Petitioner for the proposition that "merely casting doubt on the employer's articulated reason does not suffice to meet the plaintiff's burden of demonstrating discriminatory intent," 732 F.2d at 1043. However, Petitioner conveniently failed

to mention that such case was not a summary judgment case, but one arising from the district court's entry of judgment following a full non-jury trial, where the employee was given an opportunity to cross-examine the employer's witnesses, and where the court had an opportunity to observe witnesses and to weigh their credibility.

With regard to *Dea v. Look*, 810 F.2d 12 (1st Cir. 1987), Respondent submits that this was a decision which did not follow the Supreme Court decisions in *Aikens, Burdine* and *Furnco*. For example, the First Circuit stated that even if an employee were to refute the employer's proffered reasons, this would not be enough for the employee to survive a motion for summary judgment. The First Circuit thus applied an incorrect standard. Although it does not clearly say what type and amount of evidence would be necessary, the impression left by *Dea v. Look* is that in the First Circuit, an employee in order to survive a motion for summary judgment must produce direct evidence, or indirect evidence in the form of statistics showing a statistical disparity against persons over age 40. The First Circuit in failing to follow the dictates of *Aikens, Burdine* and *Furnco*, has made it nearly impossible for an employee to prevail in a discrimination case. The Sixth Circuit in *Askin v. Firestone Tire & Rubber Co.*, 785 F.2d 307 (6th Cir. 1986), *aff'g without opinion*, 600 F. Supp. 751 (E.D. Ky. 1985), also failed to follow the above-mentioned Supreme Court decisions.

The instant case is factually distinguishable from *Dale v. Chicago Tribune Co.*, 797 F.2d 458 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 954 (1987), in that in *Dale*, the Seventh Circuit indicated the employee had merely made "self-interested assertions" in opposing the proffered reasons,

whereas in the instant case, Respondent produced evidence of Faust's actual job duties following Respondent's layoff, and produced statements from Petitioner's own managers, in rebuttal of the employer's proffered reasons.

There is no conflict in the circuits. The decisions of the Courts of Appeals for the First, Sixth and Seventh Circuits cited by Petitioner, either are factually distinguishable from the instant case, or failed to follow the Supreme Court decisions in *Aikens, Burdine* and *Furnco;* it is those aberrant cases which are the source of confusion, not cases like the decision below and the Third Circuit decision in *Chipollini v. Spencer Gifts*. However, even the existence of confusion of this sort does not arise to the type of conflict between the courts of appeals which would require the grant of certiorari.

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CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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